

Broadening Traditional ADR Notions of Disclosure: Special Considerations for Posting Conflict Resolution Policies and Programs on E-Business Web Sites

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Full and timely disclosure remains a paramount concern for practitioners in the field of alternative dispute resolution (ADR). Ethical codes require arbitrators and mediators to disclose any relationships that may impact their impartiality.¹ Procedural rules of ADR administering organizations call upon

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¹ See AM. ARBITRATION ASS'N & SOC'Y OF PROF'LS IN DISPUTE RESOLUTION, MODEL STANDARDS OF CONDUCT FOR MEDIATORS § III (1994) (dealing with disclosure and conflicts of interest); THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II (1977) (codifying arbitrator's duties as to disclosure), available at <http://www.adr.org/rules/ethics/code.html> (last visited Oct. 11, 2001); SECS. INDUS. CONFERENCE ON ARBITRATION, THE ARBITRATOR'S MANUAL, (Nat'l Ass'n of Sec. Dealers ed., 2001), available at http://www.nasdadr.com/sica_manual.asp (last visited Oct. 30, 2001) (explaining requirements as to disclosure); SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION (SPIDR) ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (1986) (indicating duty of disclosure as ongoing obligation to parties throughout ADR process), available at <http://www.spidr.org/ethic.htm> (last visited July 3, 2001).

For example, Canon II of the Code of Ethics for Arbitrators in Commercial Disputes states,

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

1. any direct or indirect financial or personal interest in the outcome of the arbitration;

2. Any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They

ADR neutrals to disclose conflicts of interest that may impair their objectivity.² Applying ethical codes and statutory law,³ the Supreme Court vacated a unanimous arbitral award in which an ADR practitioner failed to make adequate disclosures of business ties, even though no actual bias in the process was alleged.⁴ With the emergence of online dispute resolution (ODR),⁵ the ABA Task Force on E-Commerce and Alternative Dispute

should also disclose any such relationships involving members of their families or their current employers, partners or business associates.

THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II(A) (1977)

² See AM. ARBITRATION ASS'N, COMMERCIAL DISPUTE RESOLUTION PROCEDURES M-5 (2000) [hereinafter COMMERCIAL DISPUTE RESOLUTION PROCEDURES] (discussing mediator qualifications and disclosure requirements); COMMERCIAL DISPUTE RESOLUTION PROCEDURES, *supra*, at R. 19 (outlining disclosure and challenge procedures); AM. ARBITRATION ASS'N, INTERNATIONAL ARBITRATION RULES art. 7 (2000) (discussing duty to disclose in international arbitrations); AM. ARBITRATION ASS'N, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES § 11 (2001) [hereinafter NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES] (indicating standards for disclosure of employment arbitrators); CTR. FOR PUB. RES. INST. FOR DISPUTE RESOLUTION, RULES FOR NON-ADMINISTERED ARBITRATION OF INTERNATIONAL DISPUTES R. 7 (2000) [hereinafter RULES FOR NON-ADMINISTERED ARBITRATION OF INTERNATIONAL DISPUTES] (setting forth disclosure and challenge procedures in international conflicts), *available at* <http://www.cpradr.org/arbi-rules.htm> (last visited Oct. 30, 2001); NAT'L ASS'N OF SEC. DEALERS, CODE OF ARBITRATION PROCEDURE 10312 (2001), *available at* http://www.nasdaq.com/arb_code/arb_code2.asp#10312 (last visited Oct. 11, 2001) (outlining disclosure and disqualification procedures). For example, under the American Arbitration Association's (AAA) commercial arbitration rules, "[a]ny person appointed as a neutral arbitrator shall disclose to the AAA any circumstances likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives." COMMERCIAL DISPUTE RESOLUTION PROCEDURES, *supra*, at R. 19.

³ The United States Arbitration Act, 9 U.S.C. § 10 (1994) (allowing federal courts to vacate arbitral awards based on arbitrator bias, fraud or corruption); UNIF. ARBITRATION ACT § 12(2) (1956), 7 U.L.A. 281 (1997) (allowing state courts to vacate arbitral awards based on arbitrator bias or misconduct).

⁴ See *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (vacating unanimous three-panel award when one member failed to disclose earlier business relationship based on mere appearance of impropriety without showing of actual bias).

⁵ For the purpose of this Article, the term "ODR," refers to ADR methods that use online technologies such as e-mail, videoconferencing, chat rooms, listservs, and conferencing software. The disputes may arise either from offline or online transactions. See generally Lucille M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 TUL. J. OF TECH. & INTELL. PROP. 55 (2001) (providing an overview of wide range of ODR mechanisms on the Web).

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Resolution (ABA Task Force) has drafted a preliminary report indicating that it plans to prepare Model Disclosure Provisions for ODR providers.⁶ To date, the focus of codes and court cases has been on the disclosure duties of the ADR neutral and not the disclosure responsibilities of the participants in the process.

However, the growth of the World Wide Web as a virtual market for business-to-business (B2B)⁷ and business-to-consumer (B2C)⁸ transactions requires a broader definition and application of traditional disclosure provisions. Some commercial web sites may place pre-dispute ADR clauses in their terms of use⁹ while others may direct customers to third-party ADR services after disputes have arisen.¹⁰ In the Internet context, the obligations

⁶ AM: BAR ASS'N TASK FORCE ON E-COMMERCE & ALTERNATIVE DISPUTE RESOLUTION, DRAFT PRELIMINARY REPORT & CONCEPT PAPER 12 (May 2001), *available at* <http://www.law.washington.edu/ABa-eADR/drafts/>. When dealing with disclosures, the Task Force also expects to consider such ODR concerns as provider security measures, record retention, process and document confidentiality and conflicts of interest. *Id.*

⁷ It is estimated that B2B trade alone will top \$6 trillion by 2005, with over a third of these revenues being generated through online market exchanges. Melissa Campanelli, *Trading Places*, ENTREPRENEUR, Nov. 2000, *at* http://www.entrepreneur.com/Your_Business/YB_SegArticle/0,4621,281711,00.html (last visited Oct. 30, 2001).

⁸ Despite the recent difficulties of B2C businesses, it is estimated that B2C trade will reach \$5 trillion globally by 2005, with the United States garnering about thirty-five percent of these online revenues. Mary Mosquera, *Global E-Commerce to Hit \$5 Trillion in 2005*, INTERNETWEEK (May 21, 2001), *at* <http://www.internetweek.com/story/INW200010523S0005> (last visited Oct. 30, 2001).

⁹ See Ebay Rules & Safety Overview, <http://pages.ebay.com/help/community/index.html> (last visited Oct. 30, 2001) (terms of use include pre-dispute arbitration clause); Gateway.net Terms of Use, <http://portal.compuserve.com/gatewaynet/menu/terms.asp> (last visited Oct. 30, 2001) (terms of service contain pre-dispute arbitration clause); GE Capital Loan Services Terms of Use, <http://www.gecapitalloanservices.com/BTerms.asp> (last visited July 3, 2001) (terms of use include pre-dispute arbitration clause); Medscape Health for Consumers Terms of Use, <http://www.cbshealthwatch.medscape.com/cjsp/common/terms.jsp> (last visited Oct. 30, 2001) (terms of service call first for use of mediation followed by arbitration); realestatejobs.com Terms of Use, <http://www.realestatejobs.com/terms.asp> (last visited Oct. 30, 2001) (terms of use call first for use of mediation followed by arbitration).

¹⁰ E-businesses that do not wish to run their own ADR/ODR programs may call upon both non-profit and for-profit entities for assistance. For example, under the Better Business Bureau's Online Reliability program, a member e-business must agree to use the Bureau's dispute resolution options to help resolve disputes with its online customers. Public Comments by Charles I. Underhill, Senior Vice President, Dispute Resolution

of disclosure should be extended to include certain duties for e-businesses requiring or offering ADR/ODR services to handle their online conflicts with other businesses and consumers. Through proper e-business disclosures, online business and consumer customers can make informed decisions about the use of ADR/ODR methods.

It is now necessary to expand the traditional definition of disclosure beyond third-party ADR/ODR providers to include e-businesses. This Article will discuss the nature of potential ADR/ODR disclosure obligations that could be required of e-businesses in the future to aid informed customer choices about ADR/ODR policies and programs. Five basic disclosure duties for e-businesses will be discussed: 1) the duty to disclose the existence of pre-dispute ADR/ODR clauses, 2) the duty to disclose the nature of one's ADR/ODR programs, 3) the duty to disclose any business or financial relationships with ADR/ODR service providers, 4) the duty to disclose the outcomes or findings of ADR/ODR proceedings, and 5) the duty to disclose information to educate the public about ADR/ODR methods. Throughout this Article, practical recommendations are made to help e-businesses meet the demands of these new disclosure requirements.

I. BROADENING THE CONCEPT OF DISCLOSURE

Traditionally, ethical codes have required arbitrators and mediators to disclose to the parties and the administering agency, if applicable, any past or present financial, business, professional, familial or social relationships that may affect their objectivity.¹¹ These relationships may involve the disputing parties, their respective counsel, or any witnesses expected to appear in the

Division, to the Federal Trade Commission 8 (March 21, 2000), at <http://www.ftc.gov/bcp/altadisresolution/comments/underhillbbb.pdf> (last visited Oct. 30, 2001). Square Trade offers a seal program, which includes participation in its mediation and arbitration services when conflicts arise with its partners. Square Trade, Square Trade Builds Trust in Transactions, <http://www.squaretrade.com> (last visited Oct. 30, 2001). Square Trade's partners include such e-businesses as eBay (popular online auction site), eLance (B2B global services marketplace), Guru (a B2B exchange for independent consultants); Onvia (a B2B marketplace for entrepreneurs), BridgePath (a recruitment and staffing firm), Frictionless (a producer of intelligent e-purchasing software), and RentAnything (a rental firms that leases anything from vacation homes to hedge trimmers). Square Trade Partners, <http://www.squaretrade.com/cnt/jsp/prt/partners.jsp> (last visited Nov. 5, 2001).

¹¹ See *supra* note 1 and accompanying text.

proceedings.¹² Neutrals are expected to avoid even the appearance of bias or partiality.¹³

The duty to disclose is a continuing obligation that must be exercised at the time a mediator or arbitrator is selected or at any time during the process when an actual or potential conflict of interest arises.¹⁴ Upon disclosure, the parties can determine whether or not the connection harms impartiality and may seek the removal of the neutral from the case. Regardless of what disclosures have been made, parties may challenge a neutral if they have reasonable grounds for doubting the independence and impartiality of the neutral.¹⁵ The failure of the neutral to make proper disclosures is a violation of ethical responsibilities and procedural duties, which may result in an award being overturned¹⁶ and the loss of immunity in any subsequent civil lawsuit.¹⁷

¹² See *supra* note 1 and accompanying text.

¹³ See *supra* notes 1, 4 and accompanying text; see also *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968).

¹⁴ See *supra* note 1 and accompanying text.

¹⁵ See AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION R. 19 (2000); AM. ARBITRATION ASS'N, INTERNATIONAL COMMERCIAL RULES arts. 7, 8 (2000); COMMERCIAL DISPUTE RESOLUTION PROCEDURES, *supra* note 2, at M-5; CPR LEGAL PROGRAM, CTR. FOR PUB. RES., RULES FOR NON-ADMINISTERED ARBITRATION Rule 7.5–7.6 (2000); RULES FOR NON-ADMINISTERED ARBITRATION OF INTERNATIONAL DISPUTES, *supra* note 2, at R. 7.5–7.6; NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES, *supra* note 2, § 11(c)(1). Under the arbitration rules of the NASD, the parties are allowed one peremptory challenge without cause and unlimited challenges with cause. NAT'L ASS'N OF SEC. DEALERS, CODE OF ARBITRATION PROCEDURE 10311 (2001), at http://www.nasdaq.com/arb_code/arb_code2.asp#10311 (last visited Oct. 30, 2001).

¹⁶ See *Commonwealth Coatings*, 393 U.S. at 150.

¹⁷ See *Butz v. Economou*, 438 U.S. 478, 512–13 (1978) (upholding immunity of federal officials performing adjudicatory functions within a federal agency); *Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994) (upholding quasi-judicial immunity of a mediator acting within scope of his official duties); *Howard v. Drapkin*, 271 Cal. Rptr. 893, 903 (Cal. Ct. App. 1990) (upholding quasi-judicial immunity for a psychologist who provided non-binding findings and recommendations in a child custody and visitation dispute); SECS. INDUS. CONFERENCE ON ARBITRATION, *supra* note 1 (warning arbitrators to make full disclosures in order to avoid loss of civil immunity), available at http://www.nasdaq.com/sica_manual.asp (last visited Oct. 30, 2001). But see Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 803–04 (1999). In certain states, statutory laws provide some form of absolute or limited immunity for mediators. *Id.* at 804; Stephen Goldberg et al., *Roundtable: Ethical Obligations and Responsibilities of the Mediator and Mediator Immunity*, available at <http://arbiter.wipo.int/events/conferences/1996/roundtable.html> (last visited July 10, 2001).

In the offline world, disclosure is an essential element of protecting the impartiality and fundamental fairness of the process.¹⁸ But these disclosure obligations apply only to neutrals in an ADR procedure and not to the parties. So far, current ethical codes and procedural rules do not address the obligations of a party to make appropriate disclosures before the use of the ADR process. The ABA Task Force currently studying the use of ADR/ODR to resolve online disputes is proposing disclosure rules for ODR providers, but no such disclosure duties are required for e-businesses.¹⁹

But it is in the online environment that the disclosure issue takes on a unique character. With a wide variety of e-commerce stakeholders calling for e-businesses to make greater use of ADR/ODR to resolve online disputes with consumers and other businesses,²⁰ there is a need to consider a new dimension for disclosure that includes disclosure duties for e-businesses.

¹⁸ As the Introductory Note to Canon II of the Code of Ethics for Arbitrators in Commercial Disputes explains,

This code reflects the prevailing principle that arbitrators should disclose the existence of interests or relationships that are likely to affect their impartiality or that might reasonably create an appearance that they are biased against one party or favorable to another This code does not limit the freedom of parties to agree on whomever they choose as an arbitrator. When parties, with knowledge of a person's interests and relationships, nevertheless desire that individual to serve as an arbitrator, that person may properly serve.

THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 1, at Canon II, available at <http://www.adr.org/rules/ethics/code.html> (last visited Oct. 30, 2001).

¹⁹ See *supra* note 6 and accompanying text.

²⁰ See Post Workshop Public Comments by the European Commission to the Department of Commerce & Federal Trade Commission 1-2 (May 30, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments> (last visited Oct. 30, 2001); Public Comments by Ministry of International Trade and Industry (MITI), Japan, to Federal Trade Commission 1-2 (June 29, 2000), at <http://www.ftc.gov/bcp/altdisresolution/postworkshopcomments/yasunaga.htm> (last visited Oct. 30, 2001); Public Comments by Paul Skehan, Eurochambres (European Chambers of Commerce) to Federal Trade Commission 1, at <http://www.ftc.gov/bcp/altdisresolution/comments/skehan.pdf> (last visited Oct. 30, 2001); Public Comments of Ethan Katsh, Director, Center for Information Technology and Dispute Resolution, to Federal Trade Commission (Apr. 12, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/katsh.htm> (last visited Oct. 30, 2001); Public Comments of National Consumers League, the Electronic Privacy Center and Consumer Federation of America to the Federal Trade Commission 1 (June 26, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/ncl.htm> (last visited Oct. 30, 2001) [hereinafter Consumer Groups' Comments]; Public Comments of Professor Karim Benyekhief, eResolution, to Federal Trade Commission, at <http://www.ftc.gov/bcp/altdisresolution/comments/benyekhief.pdf> (last visited Oct. 30,

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As e-commerce grows on the Web, so do the number of Internet-based conflicts.²¹ There are some key differences between online and offline disputes. In the online world, the parties are normally strangers to each other and have not had any opportunity to meet face-to-face to negotiate the transaction. Typically, the e-business may often be in a different state or country than its business or consumer customers. Unlike their offline counterparts, there may be no local commercial outlet through which the unsatisfied customer can seek redress if a problem arises during, or as a result of the transaction.²² From a legal perspective, cross-border online transactions call into question the ability of judicial authorities to bring out-of-state or foreign parties into local courts or to enforce awards derived from

2001); Public Comments of Ryan Baker, WebMediate, Inc. to Federal Trade Commission (2000) at <http://www.ftc.gov/bcp/altdisresolution/comments/bakerryan.pdf> (last visited Oct. 30, 2001); Public Comments of Steve Abernathy, President and CEO, Square Trade, Cara Cherry, Director of Square Trade Mediation Network, to Federal Trade Commission (Apr. 19, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/squaretrade.pdf> (last visited Oct. 30, 2001). *But see* Ponte, *supra* note 5, at 91–92 (questioning effective use of ADR/ODR for online consumer disputes until unresolved issues of enforceability, program cost, neutral training, and public education about ODR are addressed).

²¹ Michael Liedtke, *Online Mediators Seek Opportunities*, YAHOO! NEWS (Apr. 30, 2000), at <http://www.yahoo.com> (on file with the Ohio State Journal on Dispute Resolution). The Federal Trade Commission has reported Internet-related complaints between 1998 and 1999 are up 135%, from 7955 to 18,622 complaints. Carolyn Said, *Net Services Referee Disputes Between Online Sellers, Buyers*, S.F. CHRON., June 12, 2000, at C3. In addition, the National Consumers League registered a thirty-eight percent increase in online complaints about B2C transactions in 1999. *Id.*

²² Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 675–76 (2000); John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L.J. 893, 895–97 (1999). In the virtual marketplace of the Web,

the geographic openness of electronic commerce makes stranger-to-stranger transactions more likely. The absence of informal means of developing trust, as when one shops regularly at the local bookstore, means that both merchants and consumers will be inhibited in engaging in commerce unless they have some recourse if the deal goes sour. . . . Offering to sell goods on a web page published on a server physically located in Kansas is as visible to consumers in Kosovo as in Kansas. . . . [I]t is difficult to localize injury-producing conduct or the injury itself in Internet-based markets or political arenas. Traditional dispute resolution machinery depends upon localization to determine jurisdiction. Impediments to localization create uncertainty and controversy over assertions of jurisdiction. . . . It may frustrate communities that resent being unable to reach through their legal machinery to protect local victims against conduct occurring in a far-off country.

Peritt, *supra*, at 675–76 (citation omitted).

standard litigation or small claims courts in other nations.²³ From a practical perspective, this physical distance makes it more difficult and costly to prosecute complaints, particularly for low-cost consumer transactions.²⁴

²³ The global nature of the Internet raises new and perplexing concerns about court authority over parties, over the application of laws, and over the enforcement of judicial awards. Ethan Katsh, Janet Rifkin, & Alan Gaitenby, *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law,"* 15 OHIO ST. J. ON DISP. RESOL. 705, 726-27 (2000); Alejandro E. Almaguer & Roland W. Baggott III, Note and Comment, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711, 711-12 (1998); Robert C. Bordone, Note, *Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems, and a Proposal*, 3 HARV. NEGOT. L. REV. 175, 181 (1998). As Mr. Bordone stated,

In Cyberspace, there are no geographic boundaries. Communication in cyberspace knows no borders. It is everywhere and no where in particular. It cuts across national borders and undermines the relationship between geographical location and the power of local government's efforts to regulate online behavior. How to deal with issues of boundary, jurisdiction, and choice of law across state and national boundaries are problems that are unique to the Internet. These problems must be addressed apart from real world legal system simply because there is no single "real world" legal system that can be applied uniformly in Cyberspace without agreement from all countries to abide by it.

Id.; see *supra* note 22 and accompanying text.

Some authors have suggested that traditional notions of jurisdiction and sovereignty must give way to new forms of jurisdiction and authority found in virtual communities and marketplaces. Katsh et al., *supra*, at 731-33; E. Casey Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 217-18 (1996); Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. & TECH. L. REV. 69 (1998); Bordone, *supra*, at 181.

²⁴ It has been estimated that consumer disputes typically involve relatively small dollar amounts between \$300 to \$3,000. Consumer Groups' Comments, *supra* note 20, at 1. In one case, the parties were disputing a two dollar shipping charge. Carl S. Kaplan, *Mediators Help Settle Online Auction Disputes*, N.Y. TIMES ON THE WEB, May 7, 1999, at <http://www.nytimes.com/library/tech/99/05/cyber/cyberlaw/07law.html> (on file with the Ohio State Journal on Dispute Resolution).

On the issue of low cost transactions on the Web, Mr. Gerard deGraaf, Trade Counselor, European Commission Delegation to the United States, indicated in a recent address to the Better Business Bureau,

At a micro-level, our consumers would probably feel left out in the cold. The majority will probably shy away from making cross-border purchases, but those who do go ahead and encounter problems, will have a hard time finding relief. Can you imagine a European consumer filing a complaint in a US court against a US Internet company over e.g. a purchase of a \$600 tent that contrary to promises is not watertight? Or an American consumer going to a court in Italy because the \$300 leather shoes that he ordered over the Internet do not fit properly? Of course, not.

Businesses or consumers that undertake commercial transactions online may find that if a dispute arises they may be required to use some form of ADR/ODR under the web site's terms of use. The unhappy business or consumer customer has not had any opportunity to negotiate any of the terms of the agreement but may be forfeiting substantive choices as to the type of ADR/ODR to be used and the procedures to be implemented for the type of ADR/ODR chosen.²⁵ Under such terms-of-use provisions, the e-business may select the type of ADR process, determine which rules will apply to that process, identify which ADR/ODR provider will handle the procedure and at what costs, limit the remedies available to the aggrieved party, and require in-person meetings in a state or city of their own choosing.²⁶ In other cases, in the legal no man's land of the global web, customers may feel compelled to accept ADR services proffered by the e-business after a dispute has arisen for fear that there are no other options to resolve their conflict.²⁷

To help support fundamental fairness in the online world, it may be important to expand the meaning and scope of traditional notions of disclosure to include disclosure obligations for e-businesses that employ pre-dispute ADR/ODR clauses in their terms of service or that systematically offer ADR/ODR services to disgruntled customers. In either online situation mentioned above, the e-business clearly has the upper hand in the conflict

What if a Danish consumer would take action against a Nebraskan or Texan web company in Danmark [sic]? Or an American consumer dragging an Austrian website before a Court in New Hampshire?

Think of the legal insecurity that would create, not even talking about the legal costs that these actions could trigger. Courts offer no practical remedy for e-commerce disputes. They are there as a last resort. We need much more practical ways to resolve disputes. We need to make it as easy to resolve a complaint as it is to make a purchase.

Gerard de Graaf, Building Trust in the Electronic Market Place: How BBB Can Help? 7-8 (Sept. 26, 2000) (address before the Better Business Bureau Annual Meeting in Puerto Rico), at http://www.bbbonline.org/about/press/news_2000.asp (last visited Oct. 30, 2001).

²⁵ See Paul D. Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225, 225-29 (1998); Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts*, 32 COLUM. J.L. & SOC. PROBS. 275, 276-77 (1999); Lucy Katz, *The Evolving Judicial Regulation of Arbitration—Private Norms and Public Rights* 6 (2000) (unpublished manuscript, on file with author) (discussing procedural fairness and due process issues in a mandatory arbitration context).

²⁶ Carrington, *supra* note 25, at 225-28; Senderowicz, *supra* note 25, at 276-78.

²⁷ See *supra* notes 22-23 and accompanying text.

resolution process.²⁸ The e-business is not merely a passive participant but an active agent in either compelling or propelling the parties to use ADR or ODR services. In these circumstances, greater responsibilities should be placed on the e-business to help level the playing field with its online customers.

Disclosure should not merely be limited to the impartiality of the neutral but should be broadened to address the duties of e-businesses to make their ADR/ODR processes transparent to visiting customers. E-business disclosure obligations should address the presence of pre-dispute ADR/ODR clauses in an e-business's terms of use, the type and costs of the ADR/ODR process, the nature of the relationship between the ADR/ODR services provider and the e-business, and the outcomes or findings of earlier ADR/ODR proceedings involving the e-business. In addition, full and fair disclosure should also involve the obligation of e-businesses to help educate their customers, both business people and consumers, about ADR/ODR methods.²⁹ As the portal to e-commerce, online firms should provide adequate disclosures about ADR/ODR in order for customers to make more informed decisions about the use of these conflict resolution mechanisms.

A. Duty To Disclose ADR/ODR Clauses and Nature of Programs

1. Duty To Disclose the Existence of Pre-Dispute ADR/ODR Clauses

From the outset, any meaningful duty to disclose placed on e-businesses must first require that these online firms make visiting businesses and consumers well aware of the existence of an ADR/ODR provision in their terms of use. Merely burying the clause in the terms of service and expecting online visitors to read and understand boilerplate provisions does not equate with notions of fair and full disclosure.³⁰ Many international e-commerce

²⁸ Carrington, *supra* note 25, at 225–28; Senderowicz, *supra* note 25, at 276–77; Katz, *supra* note 25, at 6.

²⁹ See discussion *infra* Part I.A.

³⁰ Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. (forthcoming Spring 2002) (manuscript on file with author); Rothchild, *supra* note 22, at 974. “[A] disclosure that is placed on a Web site in such a way that site visitors may easily overlook it is not of much value.” *Id.*

associations³¹ and the mandates of European Union (EU) policy³² require that e-businesses spell out their terms of use in plain language, including providing transparent conflict resolution mechanisms. In light of the global nature of the Web, e-businesses should be prepared to provide this ADR/ODR information in the various languages of the virtual markets in which they do business.³³ If an e-business does not want to provide multi-

In discussing Internet marketing disclosures, a recent Federal Trade Commission publication advised e-businesses that "information that is significant to the advertised offer should not be buried at the end of a long web page that requires consumers to scroll past unrelated information. Consumers should not have to wander through an electronic maze to discover important conditions or limitations of an offer." THE FED. TRADE COMM'N, BIG. PRINT. LITTLE PRINT. WHAT'S THE DEAL? HOW TO DISCLOSE THE DETAILS (June 2000), at <http://www.ftc.gov/bcp/online/pubs/buspubs/bigprint.htm> (last visited Oct. 13, 2001). See THE FED'L TRADE COMM'N, FTC CONSUMER ALERT! GOING SHOPPING? GO GLOBAL! A GUIDE FOR E-CONSUMERS (Oct. 2001) (warning consumers only to do business with online firms that state clearly their dispute resolution policies and that offer fast and fair avenues for recourse), at <http://www.ftc.gov/bcp/online/pubs/alerts/glblalrt.htm> (last visited Oct. 13, 2001).

³¹ See, e.g., Global Coalition of Companies Involved in E-Commerce Endorses Detailed Consumer Protection Guidelines (Press Release of Global Business Dialogue on Electronic Commerce (GBDe)) (Sept. 26, 2000), <http://www.gbdeconference.org/media/092600> (on file with the Ohio State Journal on Dispute Resolution) (last visited Oct. 6, 2000) (calling for use of ADR programs that are impartial, accessible, timely and transparent); Guidelines for Merchant-to-Consumer Transactions and Commentary, at <http://www.ecommercegroup.org/guidelines.htm> (last visited Oct. 13, 2001) (suggesting that e-tailers merchants fully disclose and allow consumers to review all terms and conditions prior to making transactions final and binding); Recommendations of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, Organisation for Economic Cooperation and Development, I-III, VI(B) (Dec. 9, 1999), at <http://www.oecd.org/dsti/sti/it/consumer/prod/guidelines.htm> (last visited Oct. 13, 2001) (recommending that online firms should provide fair and transparent dispute resolution mechanisms). See generally Rothchild, *supra* note 22, at 675-76 (calling for proper disclosures in online marketing to aid informed customer choices).

³² Electronic Commerce Legal Issues Platform: Draft Brochure Legal Issues of Electronic Commerce—A Practical Guide for SMEs (Esprit Project 27028) <http://europa.eu.int/ISPO/legal/en/lab/991216/brochure.doc> (on file with the Ohio State Journal on Dispute Resolution) (last visited Dec. 23, 2000); Report on the Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market (COM(98)0586-C4-0020/99-98/0325(COD)) 42 (Apr. 23, 1999), available at <http://europa.eu.int/ISPO/ecommerce/legal.htm#frame> (last visited Oct. 13, 2001).

³³ Ponte, *supra* note 30. By the year 2005, it is estimated that fifty-seven percent of all Internet users will not speak English. Mozelle W. Thompson, *The Challenges of Law in Cyberspace—Fostering the Growth and Safety of E-Commerce*, 6 B.U. J. SCI. & TECH.

lingual ADR/ODR pages, then they can restrict access to their site outside of designated markets through technological filters or geographic limits in their terms of service.³⁴

Without using legalistic jargon, the e-business should clearly and prominently identify their ADR/ODR clause in their terms of use. A separate and prominent dispute resolution icon, similar to those used to point out privacy policies, should be placed on the web site. This icon should clearly notify the business or consumer that the e-business uses ADR/ODR to resolve disagreements.³⁵

As with privacy notice hyperlinks, visitors could click on the ADR/ODR icon to be transported to a separate page containing the applicable ADR/ODR provision. E-businesses might also require parties to click on a separate "I Agree" icon to show that they have read and understood the ADR/ODR program before allowing visitors to proceed to the online ordering system at the site. In this manner, customers can clearly signify their willingness to participate in ADR/ODR if a dispute arises later.

However, the mere disclosure of the clause in one's terms of use does not insure its enforceability. U.S. courts have traditionally upheld the use of ADR provisions in contracts of adhesion.³⁶ However, the EU views pre-dispute ADR provisions in consumer transactions as inherently unfair and is unlikely to enforce them.³⁷ Therefore, an e-business that does substantial

L. 1, 2 (2000). Currently, about forty percent of all Internet users are located outside the United States. GERALD R. FERRERA, ET AL., *CYBERLAW: TEXT AND CASES* 11 (2000).

³⁴ Ferrera, *supra* note 33, at 33.

³⁵ Ponte, *supra* note 30.

³⁶ See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 88-89 (2000) (upholding an arbitration clause in a mobile home financing agreement); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282 (1995) (upholding arbitration clause, contrary to Alabama law, for termite control services provided within state but viewed as affecting interstate commerce); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991) (upholding a Florida forum selection clause against Washington plaintiffs in a tort case as reasonable and providing cost benefits for both parties); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (enforcing adhesive terms of shrinkwrap software license under traditional contract principles); *Watts v. Polaczyk*, 619 N.W.2d 714, 719 (Mich. Ct. App. 2000) (upholding an arbitration clause in a contingent fee agreement).

³⁷ U.S. PERSPECTIVES ON CONSUMER PROTECTION IN THE GLOBAL ELECTRONIC MARKETPLACE 10, 14, 17-18 (Apr. 21, 1999) http://europa.eu.int/comm/consumers/policy/developments/e_comm/e_comm01_en.p (on file with the Ohio State Journal on Dispute Resolution) (last visited Dec. 23, 2000). Also, the national laws of certain European countries, such as Finland, England, Wales, and Northern Ireland, generally prohibit the enforcement of pre-dispute ADR provisions in

online business with consumers in Europe will have a duty to disclose in advance that it offers or recommends, rather than requires, ADR/ODR services for disputes with EU consumers.

2. Duty To Disclose the Nature of ADR/ODR Programs

Identifying that one requires or offers ADR/ODR services is only one aspect of full and fair disclosure. An online firm should also explain how its specified ADR/ODR process works by posting relevant information on its web site or by providing links to its ODR provider's site, which posts this information.³⁸ This information can be presented on the site using simple flow charts and graphs.³⁹ Placing more detailed information in written prose on the applicable site can augment these visual representations. The online firm may find it useful to use the familiar frequently asked questions (FAQ) format found on most web sites to help parties to understand the ADR/ODR program. Using plain language, the FAQ section can outline the basic steps in the relevant conflict resolution process. The FAQ section could also provide a brief overall review of different ADR/ODR processes, such as negotiation, nonbinding mediation, arbitration or med-arb.⁴⁰ This page could

consumer dealings. Tapio Puurunen, *The Legislative Jurisdiction of States over Transactions in International Electronic Commerce*, 18 J. MARSHALL J. COMPUTER & INFO. L. 689, 695 n.21 (2000).

³⁸ Ponte, *supra* note 30. It has been suggested that the fastest and most cost-effective way to post ODR information is right on the online merchant's web site. Public Comments of Ryan Baker, WebMediate, Inc., to Federal Trade Commission 7, at <http://www.ftc.gov/bcp/altdisresolution/comments/bakerryan.pdf> (last visited Oct. 30, 2001).

³⁹ In an earlier version of the Square Trade web site, the ODR provider used simple storybook graphics to provide a basic tour of its program to visitors. Square Trade, The Square Trade Seal, Online Problem Solving, <http://www.squaretrade.com/demo/index.cfm> (on file with the Ohio State Journal on Dispute Resolution) (last visited June 17, 2000). That tour was supplemented by a detailed FAQ page that helped to further explain its procedures. *Id.* On Square Trade's current web site, this tour can be found by clicking on the hypertext link, "Take a quick tour of Dispute Resolution." Square Trade, A Simple, 4 Step Process To Resolve Disputes, http://www.squaretrade.com/cnt/jsp/odr/learn_odr.jsp?sessionId=odl7ifnb1?vhostid=tomcat2&stmp=squaretrade&cntid=odl7ifnb1 (last visited Nov. 28, 2001).

⁴⁰ Ponte, *supra* note 30. See, e.g., Online Alternative Dispute Resolution (2000) (offering basic overview of ODR prepared by Center for Law, Commerce & Technology, University of Washington School of Law), at <http://www.law.washington.edu/lct/publications.html> (last visited Oct. 13, 2001); DR: The Commonsense Alternative (providing the Better Business Bureau's non-legalistic

also make parties aware of the opportunity for legal representation in ADR/ODR proceedings, if desired.⁴¹

Furthermore, the e-business should outline the main distinctions between ADR/ODR and litigation procedures. The page should indicate that in using ADR/ODR, customers may be agreeing to a more limited discovery process, the lack of a jury as a decision-maker, the loss of public access to the proceedings, the potential for restricted remedies, and the narrow grounds for court review.⁴² By providing this information, business and consumer customers will be aware of these important distinctions and can weigh these differences in making a more informed choice about the use of ADR/ODR.⁴³

Another aspect of the disclosure process should deal with the issue of posting the potential costs of the ADR/ODR process on the e-business's web site.⁴⁴ A business or consumer customer should be informed in advance on the web site or in the FAQ section of the ADR/ODR page about the expected costs of the ADR/ODR program. Customers should be advised about any initial costs in filing or responding to a claim. Also, the e-business should inform its customers about the hourly rate or other form of compensation of the neutral and how the expenses for the neutral and other related costs are to be divided up between the parties. After some experience with the ADR/ODR program, the e-business should reveal the average costs of resolving a dispute under the program.

overview of various forms of dispute resolution), at <http://www.bbb.org/complaints/csa.asp> (last visited Oct. 13, 2001); Massachusetts Office of Dispute Resolution Glossary of Terms, <http://www.state.ma.us/modr/glossery.htm> (last visited Oct. 13, 2001).

⁴¹ Ponte, *supra* note 30; see Perritt, *supra* note 22, at 681.

⁴² Ponte, *supra* note 30; see Senderowicz, *supra* note 25, at 302-03.

⁴³ See Senderowicz, *supra* note 25, at 302-03; Katz, *supra* note 25, at 6.

⁴⁴ In a recent U.S. Supreme Court case, the majority determined that the failure to specify costs in advance did not automatically make an ADR clause unenforceable. However, the Court left the door open as to whether a showing of unfair or disproportionate costs might invalidate an ADR provision. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000). Yet in one instance, the EEOC successfully challenged a pre-dispute ADR clause that unfairly allocated all the costs of the ADR process on employees. *United States Equal Employment Opportunity Comm'n v. River Oaks Imaging & Diagnostic, No. H-95-755*, 1995 U.S. Dist. LEXIS 6140, at *1 (S.D. Tex. Apr. 18, 1995) (dealing with a coercive and retaliatory ADR policy that required employees to bear the full costs of an ADR proceeding). See *EEOC Agrees with Houston Medical Form on Permanent Halt to Mandatory ADR Plan*, 1995 Daily Lab. Rep. (BNA) 127 d6 (July 3, 1995). Furthermore, the transparency requirements of EU directives would suggest that stating potential costs may be essential for fairness in consumer transactions. See *supra* note 32 and accompanying text.

Square Trade's web site provides a good example of how FAQs can be used to explain the ODR process and its benefits to users. The site provides a "Top Ten FAQs" page that defines ODR, explains how to file and respond to a case, identifies the nature of disputes handled under its program, outlines the potential costs and length of the ODR process, discusses the overall benefits of ODR use, and provides a basic review of different forms of ADR/ODR. The FAQ page of the site also provides links to the firm's user agreement and confidentiality policies.⁴⁵

Clearly, a well-defined ADR/ODR program provides both business and consumer customers with a clear conflict resolution path and avoids unneeded confusion or concern about how complaints will be handled. Through the full and fair disclosure of ADR/ODR policies and programs, e-businesses are not only providing greater customer satisfaction, but are helping the e-business to remain in compliance with the policies of leading e-commerce organizations and the legal mandates of the EU and its member nations.⁴⁶

3. Duty To Disclose Any Business or Financial Relationships with ADR/ODR Service Providers

Traditionally, neutrals are expected to disclose any business or financial relationships that they may have with any of the parties, lawyers, or witnesses in a case. This disclosure duty has not been expanded to the parties in the conflict. However, e-businesses should also be required to disclose such relationships in advance if they require the use of a specific ADR/ODR service provider under a pre-dispute clause or if they systematically refer customers to a particular ADR/ODR service provider. They should clearly disclose on their web page any financial or business relationships that they may have with these selected ADR/ODR service providers.

In some instances, the connection may be an obvious one in which the e-business has a direct business or financial interest in a certain ADR/ODR service provider. For example, a firm may own all or part of an interest in an ADR/ODR service provider.⁴⁷ In addition, if the e-business receives a

⁴⁵ See Square Trade, Help—Dispute Resolution: Case Filing and Responding, http://www.squaretrade.com/cnt/jsp/hlp/help_odr_case.jsp?vjostid=tomcat1&stmp=squaretrade#odr (last visited Oct. 13, 2001).

⁴⁶ See *supra* notes 31–32 and accompanying text.

⁴⁷ Last year, Insurance Services Office, Inc. (ISO), which provides consulting and technical services to insurance brokers and companies, purchased a sixteen percent, or \$4 million share of the NAM Corporation. NAM operates clickNsettle.com, a blind bidding ODR service, and also provides offline mediation and arbitration services. *ISO Acquires*

discount or other compensation for diverting claims to an ADR/ODR provider, this fact should also be disclosed on the web page. Both types of financial connections should be fully disclosed on the online firm's web site.

In other cases, the business affiliation may be more subtle, but the relationship still poses the potential for substantial disadvantage for online customers. An e-business may have chosen an exclusive ADR/ODR provider or may systematically refer customers to a particular ADR/ODR provider after a dispute has arisen. Although the e-business may not have a direct financial stake in, or receive any special rates from the service provider, there are well-recognized concerns about the benefits of ADR/ODR programs to "repeat players."⁴⁸ Under the "repeat players" scenario, there is a concern that the customer is a stranger to the ADR/ODR service provider with little experience in the ADR/ODR process. On the other hand, the e-business, as a regular player in the system, is likely to have process advantages based on its earlier experiences and strategies using more familiar ADR/ODR procedures.⁴⁹ In addition, there may be a subtle pressure on neutrals to preserve their more lucrative, longer-term business ties with regular users. Regardless of the nature of the business or financial relationship, full and fair disclosure would require e-businesses to clearly identify any business or financial ties with their required and recommended ADR/ODR provider as well as any exclusive or systematic use of that ADR/ODR service provider.

4. Duty To Disclose Outcomes or Findings of ADR/ODR Proceedings

A bedrock principle of ADR has been the confidentiality of the process and its outcomes.⁵⁰ Ethical codes and procedural rules indicate that

Stake in Dot-com Service, J. COM., May 16, 2000, at 10. Under the proposed disclosure duties, ISO would be required to disclose this connection if it offers or requires parties to use NAM's ADR/ODR services. Furthermore, this connection may raise concerns about the impartiality and objectivity of such services in handling insurance disputes. Ponte, *supra* note 30.

⁴⁸ Carrington, *supra* note 25, at 226; Senderowicz, *supra* note 25, at 277; Katz, *supra* note 25, at 6 n.50; Consumers Groups' Comments, *supra* note 20, at 5. See *supra* note 10 and accompanying text.

⁴⁹ Senderowicz, *supra* note 25, at 277 n.11.

⁵⁰ LUCILLE M. PONTE & THOMAS D. CAVENAGH, ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS 32-33 (1999); SUSAN LEESON & BRYAN JOHNSTON, ENDING IT: DISPUTE RESOLUTION IN AMERICA: DESCRIPTIONS, EXAMPLES, CASES, AND QUESTIONS 133 (1988).

confidentiality is a requirement for ADR/ODR mechanisms.⁵¹ It is asserted that by keeping the process confidential, the parties are more likely to engage in an open exchange of ideas that will promote trust and settlement.⁵² In addition, third party neutrals are able to make decisions or aid settlement without fear of harassment or subsequent litigation by disgruntled parties.⁵³ Others have suggested that this lack of access promotes an unhealthy secrecy that prevents important legal precedents from being developed, and allows legal rights to be trammled without public knowledge or oversight.⁵⁴

Although this concept may be useful in the offline world, its continuing use in the online world has been questioned and, in some instances, openly rejected. For example, the Internet Corporation for Assigned Names and Numbers (ICANN) already posts its arbitral decisions regarding domain name disputes on the Web.⁵⁵ By posting this information, ICANN is promoting transparency in its dispute resolution process and providing guidance to others parties regarding appropriate conduct as to domain names.

In the realm of online disputes, it may be useful to publish the ADR/ODR decisions and outcomes to help inform business and consumer customers about the track record of a particular e-business. These materials can be posted on the online company's web site in order to support notions of full and fair disclosure. This posting requirement will help customers to make informed choices about e-businesses,⁵⁶ while easy accessibility of

⁵¹ PONTE & CAVENAGH, *supra* note 50, at 32–33; *see supra* note 1 and accompanying text.

⁵² LEESON & JOHNSTON, *supra* note 50, at 133; *see Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.*, 854 F.2d 900, 903–05 (6th Cir. 1988) (barring newspapers from access to ADR process of contract dispute involving the design and construction of a nuclear power plant).

⁵³ *See Butz v. Economou*, 438 U.S. 478, 512–13 (1978); *Wagshal v. Foster*, 28 F.3d 1249, 1253 (D.C. Cir. 1994); *Howard v. Drapkin*, 271 Cal. Rptr. 893, 897–98 (Cal. Ct. App. 1990).

⁵⁴ PONTE & CAVENAGH, *supra* note 50, at 33, 42; Katz, *supra* note 25, at 6; Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 25–29 (1991).

⁵⁵ ICANN Domain Name Dispute Resolution Policy pt. 4(j) (approved Oct. 24, 1999), at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (last visited Oct. 30, 2001); ICANN Rules for Uniform Domain Name Dispute Resolution Policy pt. 16(b) (approved Oct. 24, 1999), at <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (last visited Oct. 30, 2001).

⁵⁶ Ponte, *supra* note 30; Consumer Groups' Comments, *supra* note 20. Through the publication of this information, governmental agencies can take action against e-businesses that exhibit a pattern of deceptive business practices or other illegal business conduct. *Id.*; *see* Perritt, *supra* note 22, at 699–700.

these materials will encourage e-businesses to act in a responsible manner so as not to have to place damaging or embarrassing information about their business conduct on their own sites. In addition, customers who have not prevailed in a case may wish to know why they did not succeed and will have greater confidence in a transparent process in which outcomes are openly published.⁵⁷

5. Duty To Disclose Information To Educate the Public About ADR/ODR Methods

E-commerce stakeholders recognize that any ADR/ODR services can only be successful if the public is willing to use these options to resolve online conflicts. Some earlier efforts at providing ODR services were unsuccessful, in part, because of the lack of public understanding and acceptance of ADR/ODR.⁵⁸ The field of ADR/ODR has been bedeviled by an overall lack of public understanding about nontraditional conflict resolution mechanisms, their benefits, and limitations. Online customers cannot be expected to trust or respect processes that are unfamiliar to them.⁵⁹

As the main interface with online customers, e-businesses play a vital role in educating the public about ADR/ODR processes. Some of that education can take place through their FAQ page for their ADR/ODR program in which they spell out the basics of their program, provide information comparing different forms of ADR/ODR, and make distinctions between ADR/ODR and standard litigation procedures.⁶⁰ E-businesses can also serve as a resource to their customers by providing links to other ADR/ODR web sites that offer clear and objective descriptions and analyses of ADR/ODR methods.⁶¹ Further, online firms can boost public awareness

⁵⁷ Ponte, *supra* note 30.

⁵⁸ Ponte, *supra* note 5, at 64, 90–91.

⁵⁹ Ponte, *supra* note 5, at 90–91; Bordone, *supra* note 23, at 196. “Determining when to use ADR depends in large measure on whether the affected disputants have the necessary knowledge to choose ADR and the skills to use it once they have chosen it. People are unlikely to choose a procedure about which they know nothing.” Cathy A. Constantino & Christina Sickles Merchant, *Designing Conflict Management Systems—A Guide to Creating Productive and Healthy Organizations* (1996), reprinted in E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, *ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS* 1259, 1266 (1996).

⁶⁰ Ponte, *supra* note 5, at 90–91; see notes 30–46 *supra* and accompanying text.

⁶¹ Ponte, *supra* note 30; see, e.g., AAA ADR links page, at <http://www.adr.org/about/links/links.html> (page of ADR links located on web site of AAA) (last visited Oct. 31, 2000); Association for Conflict Resolution, New England

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and support of ODR by posting public service banner advertisements regarding ODR options.⁶² In addition, e-businesses can offer quick news summaries regarding recent successes or developments in the use of ADR/ODR to resolve online conflicts.⁶³ By working to promote public understanding of ADR/ODR methods, e-businesses can gain improved public acceptance and, therefore, greater use of ADR/ODR processes to resolve online business and consumer disputes.⁶⁴

II. CONCLUSION

Currently, most e-commerce stakeholders contend that ADR/ODR methods provide the best avenues for resolving B2B and B2C disputes. With the emergence of various ADR/ODR options on the Web, traditional concepts of disclosure must be expanded to include disclosure obligations for online firms using ADR/ODR mechanisms. E-businesses should be responsible to disclose 1) the existence of pre-dispute ADR/ODR clauses in their terms of use, 2) the nature and costs of their ADR/ODR program, 3) any business or financial relationships they have with their ADR/ODR service providers, 4) prior outcomes or findings of ADR/ODR proceedings in which they were parties, and 5) information necessary to educate the public about ADR/ODR methods. Without these disclosure requirements, online businesses and consumers will not be making full and informed decisions about the use of ADR/ODR. Through these components of full and fair disclosure, e-businesses will gain greater credibility for and improved utilization of their ADR/ODR programs in the online community.

Chapter, at <http://www.nespidr.org/links.htm> (New England SPIDR's web site providing numerous ADR links and resources) (last visited Oct. 30, 2001); CRInfo page on the ABA Network, at <http://www.crinfo.org/aba> (comprehensive portal for links and other information on conflict resolution issues partnering ABA and Conflict Research Consortium, University of Colorado) (last visited Oct. 30, 2001); Massachusetts Office of Dispute Resolution ADR links page, at <http://www.state.ma.us/modr/links.htm> (numerous useful ADR links on web site of Massachusetts Office of Dispute Resolution) (last visited Oct. 30, 2000).

⁶² Ponte, *supra* note 5, at 91; Ponte, *supra* note 30.

⁶³ Ponte, *supra* note 5, at 91; Ponte, *supra* note 30.

⁶⁴ Ponte, *supra* note 5, at 90–91; Ponte, *supra* note 30.

